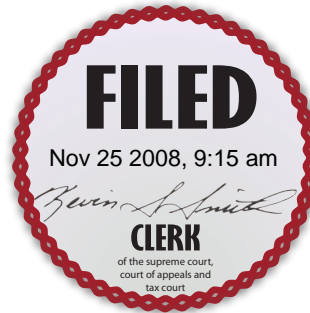


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID KIST,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0804-CR-205

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0704-MR-66326

November 25, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

David Kist (“Kist”) was convicted in Marion Superior Court of murder and Class B felony attempted robbery. Kist was sentenced to sixty years for murder and fifteen years for Class B felony attempted robbery, to be served concurrently. Kist appeals and presents three issues:

- I. Whether the trial court abused its discretion by admitting photographs of the victim;
- II. Whether the evidence was sufficient to support Kist’s conviction for attempted robbery; and
- III. Whether Kist’s aggregate sixty-year sentence was inappropriate.

Finding no error, we affirm.

Facts and Procedural History

Early in the morning of April 16, 2007, Kist and two friends pulled into the parking lot of a grocery store. Kist exited the car and encountered Wendell Anderson (“Anderson”) in the parking lot. Kist demanded money from Anderson. Following a heated exchange in which Anderson asked that Kist not rob him, Kist took out a gun and shot Anderson twice before running back to his car and leaving the parking lot in it.

Despite his gunshot wounds, Anderson entered the grocery store, whereupon employees called 911. Anderson died one hour later from his wounds.

On April 20, 2007, following a police investigation, the State charged Kist with murder, felony murder, Class B felony attempted robbery, Class A felony attempted robbery, and Class A misdemeanor carrying a handgun without a license. Following a two-day jury trial, Kist was found guilty on all counts. The trial court merged the murder and felony murder counts together and the Class A felony attempted robbery and the

Class A misdemeanor into the Class B felony attempted robbery. The trial court then sentenced Kist to sixty years on the murder charge and fifteen years on the Class B felony attempted robbery, to be served concurrently. Kist appeals.

Additional facts will be provided as necessary.

I. Admission of Photographic Evidence

Kist argues that the trial court's admission of two photographs of the victim's body was an abuse of discretion since the photos likely had an inflammatory impact on the jury. The admission of evidence falls within the sound discretion of the trial court. Swingley v. State, 739 N.E.2d 132, 133 (Ind. 2000). We review the admission of photographic evidence for an abuse of discretion. Id. Photographic evidence which is relevant may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Id. If photographs, even those gruesome in nature, act as interpretive aids for the jury and have strong probative value, they are admissible. Id.

As a general rule, autopsy photographs are inadmissible if they show the body in an altered condition. Id. The reasoning behind this rule is to prevent the jury from imputing the work of the physician to the defendant and hold the defendant responsible for the damage resulting from the autopsy. Id. Testimony from the pathologist about the procedure used which explains the presence of the damages caused during the autopsy reduces the potential for confusion. See Fentress v. State, 702 N.E.2d 721, 722 (Ind. 1998).

The first photograph shows Anderson's head and was used by the pathologist to identify the victim with the case number. The photograph did not show the body in an

altered condition. The pathologist needed to show the connection between the victim and the case to ensure that the pathologist was testifying about the correct victim using the correct autopsy. The probative value of this photograph was high and the risk of being inflammatory was low.

The second photograph was used by the pathologist to testify about the entry wounds and lack of exit wounds. Additionally, the photograph was of Anderson's back and would not have shown any injuries to Anderson's chest caused by the life-saving attempts of emergency personnel. The body was not shown in an altered condition. This photograph also had a high probative value and had a low risk of being inflammatory.

The probative value of the photographs outweighed any prejudicial impact on the jury. The trial court did not abuse its discretion when it admitted the two autopsy photographs into evidence.

II. Sufficiency of Evidence

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside.

Kist's argument merely asks that we reweigh the evidence and credibility of the witnesses. This we will not do. Randall Bratcher, a passenger in Kist's car, testified that Kist told him that Kist had tried to rob Anderson but that Anderson would not give him

any money. Tr. p. 233. The evidence was sufficient to convict Kist of attempted robbery.

III. Appropriateness of Sentence

Kist's final argument is that under the facts and circumstances of this case, his sentence was inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007). Additionally, "[s]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Id. at 490.

Kist's actions the night of the murder speak volumes of his character. After being out all night, he took drugs and carried a handgun. He had been placed on probation six days prior and chose to violate that probation in a number of ways on the evening in question. Tr. p. 552-53. Kist claims he fired in self-defense, yet Anderson was shot twice, once while turning to get away. In his taped statement to police, he claimed that his actions after the shooting were forced on him by Nate Osborne, the other occupant of the car, who threatened to kill him. Vol. 1, State's Exh. 67. Kist did not take responsibility for his shooting of Anderson but seeks to blame others. Additionally, he fled the scene following the shooting instead of helping the man he had just shot.

The nature of the offense is heinous. Kist shot Anderson once from point blank range then shot again as Anderson turned to get away because he refused to give Kist money.

Under the facts and circumstances of this case, Kist's aggregate sixty-year sentence was not inappropriate.

Conclusion

The trial court did not abuse its discretion by admitting two autopsy photographs. The evidence was sufficient to support Kist's conviction for attempted robbery. Kist's sentence was not inappropriate.

Affirmed.

BAKER, C.J., and BROWN, J., concur.